García Trucking Service, Inc. *and* Unión De Tronquistas De Puerto Rico, Local 901 IBT AFL–CIO. Case 24–CA–9663

July 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On May 5, 2004, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, García Trucking Service, Inc., Carolina, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 2(b) of the judge's Order and reletter the subsequent paragraphs accordingly:

"(b) Provide the Union with relevant information in its possession relating to subcontracting that the Union requested in its letters of May 8 and 29, 2003.

(c) Make a reasonable effort to secure any unavailable information requested in the Union's May 8 and 29, 2003 letters and, if that information remains unavailable, explain and document the reasons for its continued unavailability."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 30, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Unión de Tronquistas de Puerto Rico, Local 901 IBT AFL–CIO by failing to provide the Union with the names and addresses of newly hired employees in the appropriate unit, and WE WILL provide that information.

WE WILL NOT refuse to bargain with the Union by failing to provide the Union with the information relating to subcontracting that the Union requested on May 8 and May 29, 2003, and WE WILL provide that information

[1] We find that the Respondent unlawfully failed and refused to provide the Union with requested relevant information regarding both unit employees and subcontracting. The Respondent asserted that the requested subcontracting information was unavailable. The judge found that there was no evidence indicating that the subcontracting information was not available (i.e., in the Respondent's possession) at the time it was initially requested. Moreover, even if the Respondent had demonstrated that it did not have possession of the requested information at the time it was requested, or that it subsequently lost possession of the information, the Respondent made no effort to obtain the information from the subcontractors themselves. Cf. *Pittston Coal Group, Inc.*, 334 NLRB 690, 692–693 (2001). To provide the Respondent with more specific guidance regarding its obligation to provide relevant requested information to the Union, we modify the judge's Order. We modify the judge's Order to specify that, with regard to the subcontracting information, the Respondent must provide the information in its possession, make a reasonable effort to secure any unavailable information, and, if any information remains unavailable, explain and document the reasons for its continued unavailability.

Member Meisberg notes that this case involves information requests that predated the Union's invocation of the contractual grievance/arbitration mechanism. Consequently, Member Meisberg notes that this case does not implicate Board precedent concerning deferral of information requests in the situation in which the requests postdate a party's invocation of the contractual grievance/arbitration procedure.

which is in our possession; make a reasonable effort to secure any unavailable information requested in the Union's May 8 and 29, 2003 letters; and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

GARCÍA TRUCKING SERVICE, INC.

Vanessa Garcia, Esq., for the General Counsel.
Ruperto J. Robles, Esq., for the Respondent.
Mr. Jose Budet, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial in San Juan, Puerto Rico, on March 17, 2004. The case originates from a charge, filed by the Union on August 5, 2003, against the Company.[1] The prosecution of this case was formalized on November 25, when the Acting Regional Director for Region 24 of the National Labor Relations Board (Board), acting in the name of the Board's General Counsel, issued a complaint and notice of hearing (complaint) against the Company.

The complaint alleges the Company violated Section 8(a)(5) and (1) of the Act when, in April, May, and August it failed and refused to furnish the Union certain information the Union had requested in writing. It is alleged the requested information is necessary and relevant to the Union for the purposes of enforcing the provisions of the collective-bargaining agreement in effect between the parties and for the performance of the Union's duties as the exclusive bargaining representative for an appropriate unit of employees (Unit).[2]

The Company, at the hearing, stipulated the Board's jurisdiction is properly invoked[3] and that the Union[4] is a labor organization within the meaning of Section 2(5) of the Act. The Company denies that its failure to provide the requested information violated the Act. The Company asserts in its timely filed answer to the complaint that the information sought was made available to the Union or was not available and that the information is not necessary for the Union to perform its duties. At trial, the Company presented testimony only that the information sought was not available.

I have studied the whole record, the parties' briefs, and the authorities they rely on. Based on more detailed findings and analysis below, I conclude and find the Company violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT[5]

I. OVERVIEW

The Company and the Union were parties to a collective-bargaining agreement that expired on November 18, 2001, but which was extended until December 31, 2001. Following a strike, the parties agreed to a new collective-bargaining agreement effective on July 15, 2002, that "put into effect" the expired agreement with certain modifications. This current agreement expires on June 14, 2007. Two provisions of the current agreement are relevant to this proceeding. Article V of the agreement contains a union security clause providing that all employees will begin paying dues following their 31 superst day of employment. Article XXI provides that the Company will not subcontract unless a "minimum [number] of [unit] employees [are] working on their jobs," thereafter specified as 4 in the warehouse area, 15 in the moving area, and 15 in the truck driving area, a minimum total of 34 employees.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Union Representative Jose Budet is responsible for administration of the collective-bargaining agreement between the Union and the Company. In late 2002 and in 2003, after the new contract went into effect, documents sent to the Union by the Company reflected that dues were being deducted for fewer than 34 employees. Shop Steward Heriberto Garcia observed that individuals who were not union members were performing unit work. Budet spoke with shop stewards and employees. In these conversations he confirmed that individuals for whom dues were not being remitted to the Union were performing unit work. He also learned that the company was subcontracting work while "leaving without work at their homes members of the bargaining unit."

Following his receipt of the foregoing information relating to suspected breaches of the collective-bargaining agreement, Union Representative Budet, on April 30, sent to the Company, by facsimile copy, a letter stating that "the company has new employees whom have complied with the probationary period as set forth in the collective bargaining agreement" and requesting that the Company "[p]lease send us the name[s] and postal addresses" in order to have the new employees comply with the collective-bargaining agreement.

[1] All dates are in 2003 unless otherwise indicated.

[2] The appropriate unit is:

INCLUDED: All service and maintenance employees including chauffeurs, chauffeur's assistants and warehouse employees employed by the Employer at its facilities in Carolina, Puerto Rico.

EXCLUDED: All other employees, clerical office employees, messengers, supervisors, guards, and confidential employees as defined in the Act.

[3] The Company, Garcia Trucking Service, Inc., is a Puerto Rico corporation engaged in the transportation of goods and moving services from its facility in Carolina, Puerto Rico. The Company annually purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Puerto Rico. The Company admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[4] The Company admits, and I find that Union de Tronquistas de Puerto Rico, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

[5] The essential facts are not significantly disputed. Unless I note otherwise, my findings are based on admitted or stipulated facts, documentary exhibits, or undisputed and credible testimony.

No response was received. On May 8, the Union, by letter signed by Budet, repeated its request. No response was received. On August 14, Budet wrote the Company stating that he had requested, "two times, in writing, the names and postal addresses of the employees who are not paying dues and who have complied with the 31 days." The letter, noting that since the Union had not received either the dues of the new employees or their addresses, the Union was requesting that the Company "comply with Article V."

On August 18, the Company replied to this communication stating that dues deductions were being made for all employees "who have signed the card to authorize said deduction." The letter does not address or respond to the Union's prior requests that the Company provide the names and addresses of its new employees.

Regarding subcontracting, by letter dated May 8, Budet wrote the Company on behalf of the Union requesting information for the "purpose of preparing" grievances. The letter requested that the Company provide "each time when the company subcontracted the travel work of the truck drivers and of the movers of the contracting unit from July 15, 2002, to the present," in each instance "the reason why the company did not assign the work to the contracting unit," the amount of payments to the subcontractors together with the "invoices of these subcontracts," and "the weights of the subcontracted moves," a factor relating to compensation of the movers.

No response was received to the foregoing request. By letter dated May 29, the Union repeated its request. No response was received. The Union, on August 5, filed the charge herein. Additionally, the Union filed multiple grievances relating to the contractual violations that it contended had occurred as a result of the Company's conduct including one grievance on August 22, and two grievances on August 26.

In December, Budet and the Union's attorney met with Company Vice President of Operations Jose Garcia. The discussion related chiefly to a framework for resolving the grievances that were pending. In the course of the discussion, the Union's information requests were mentioned, and Vice President Garcia stated, "that it would be hard for him to get that information." Garcia gave no explanation regarding why it would be difficult for him to obtain the information. Garcia and Budet met again in January 2004 regarding the pending grievances, and Garcia, again without stating any reason, repeated that it would be difficult to provide the information. Budet testified that he understood that Garcia was referring to the information relating to subcontracting rather than the names and addresses of newly hired employees.

Vice President of Operations Garcia, who has held that position for over 8 years, testified that the former controller of the Company embezzled funds and, when his embezzlement was discovered and he was dismissed, that he "seized a great deal of . . . documents, including corporate and personal documents." Garcia testified that legal proceedings have been instituted against the former controller. Garcia was unable to recall, and did not provide, the specific employment dates for the former controller who began working for the Company "a year, year and a half ago." The dismissal occurred "towards the end of 2003."

Garcia further testified that, upon the dismissal of the former controller, the Company assigned its General Manager to attempt to "assemble the jigsaw puzzle that he [the former controller] left behind." It would appear that these efforts were unsuccessful because, according to Garcia, the Company "no longer [had] any need for his [the General Manager's] services" as of 2 months ago, which would have been in late January 2004.

Garcia acknowledged meeting with the Union in December 2003. Although the alleged embezzlement had been discovered, and, presumably, the disappearance of "a great deal of . . . documents," the Company informed the Union only that it was having trouble obtaining the information requested by the Union. Garcia admitted that he did not "go into the specifics."

Garcia was asked by Company Counsel, "Has the Company searched for these documents . . . [that the] General Counsel is referring to in these action[s]," Garcia answered, "The Company is taking all necessary steps to obtain the documents that the Board is requesting." [Emphasis added.] When asked whether the Company was denying the Union "these documents," Garcia responded that he did not "have them on hand." He further testified that, when he found the information, he would provide it.

B. Analysis and Concluding Findings

The complaint alleges that the failure of the Company to provide the foregoing requested information violated Section 8(a)(5) and (1) of the Act.

The Government argues that the subcontracting information sought by the Union, is necessary and relevant for the Union to represent aggrieved unit members before arbitration. Specifically the Government argues the information is relevant and necessary in as much as the Union has grievances pending arbitration due to the alleged subcontracting of bargaining unit work, the hiring of new employees, and the lack of compliance with terms of the collective-bargaining agreement on minimum guarantees. The Government argues it is without question the Union is entitled to the names, addresses, and hire dates of newly hired employees so that the Union may police the union security provision contained in the party's collective-bargaining agreement.

The Company's answer affirmatively pleads that information was provided or was not available and that the information is not necessary to the Union. The Company presented no evidence that any information was ever provided to the Union. Vice President Garcia effectively conceded the relevance of the information sought when he testified that the Company "is taking all necessary steps to obtain the documents" and that he would provide the information when he found it. The Company in its post-trial brief appears to acknowledge that the requested information is necessary and relevant and that the Company has not provided any of the requested information.

Notwithstanding the apparent admissions by the Company that the requested information is relevant and necessary for the Union to fulfill its representational and collective-bargaining obligations, I shall nonetheless discuss the Union's requests and the Company's actions related thereto. There is no evidence that any steps were taken to provide the Union with the names

and addresses of newly hired employees when that information was initially requested on April 30, when it was requested a second time on May 8, or when the Company was reminded of those requests in the Union's letter of August 14. I find it inconceivable that the Company cannot provide the Union with the names and addresses of its newly hired employees. Vice President Garcia's testimony does not establish that the names and address of those employees were not available when they were initially requested. The Company presented no evidence that the foregoing information is not currently available. Regardless of the asserted disarray of the Company's records as a result of the alleged embezzlement, a payroll has been maintained and that payroll would reflect the names and addresses of the newly hired employees. The names and addresses of unit employees are presumptively relevant.

The Union, when requesting the information regarding subcontracting, stated that it was being requested for the preparation of grievances, and the record establishes that grievances have been filed. Although information unrelated to unit employees is not presumptively relevant, information relating to subcontracting which impacts the working conditions of unit employees is relevant. See *Phoenix Coca-Cola Bottling Co.*, 337 NLRB 1239 (2002), and *Pratt & Lambert, Inc.*, 319 NLRB 529, 533 (1995). There is no evidence that the requested documents relating to subcontracting were not available when they were initially requested in May. Vice President Garcia's testimony that the Company "is taking all necessary steps to obtain the documents" suggests that no such steps were taken when the Union made its initial request. The discovery of the alleged embezzlement and alleged seizure of documents by the former controller when he was dismissed did not occur until "towards the end of 2003." Garcia's testimony that the former controller seized "corporate and personal documents" does not clearly establish that those documents included the requested records relating to subcontracting. Garcia did not deny that subcontractors had been hired and that such records had existed. Even if I assume that some or all of the requested documents were taken by the former controller, an employer's duty to supply information extends to situations in which the "information likely can be obtained from a third party with whom the employer has a business relationship that is directly implicated in the alleged breach of the collective-bargaining agreement." *Fireman & Oilers Local* 288, 302 NLRB 1008, 1009 (1991), citing *United Graphics*, 281 NLRB 463, 466 (1986). The Company presented no evidence that it has sought or is seeking to obtain the information from the subcontractors that it hired. In my opinion the Company has "failed to demonstrate that such information is unavailable." *United Graphics*, supra at 466.

I find that the information requested by the Union relating to the names and addresses of newly hired unit employees and subcontracting is relevant and necessary to the Union in enforcing the collective-bargaining agreement to which the Company and the Union are parties. I specifically reject the Company's "no violation of the Act defense," as outlined in its post-trial brief, that the requested subcontracting documents have "either disappeared or were disposed of by previous Company representatives" and thus it cannot be ordered to produce what it does not have or be found to violate the Act by its non production. In this respect the Company failed to demonstrate it could not have reconstructed the requested subcontracting information with assistance from its third party subcontractors. I find that the failure and refusal of the Company to provide the Union with the foregoing relevant information violated Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to provide the Union with requested relevant information relating to unit employees and subcontracting, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having unlawfully failed to provide the Union with the names and addresses of newly hired unit employees, relevant information that the Union initially requested on April 30, 2003, and with the relevant information relating to subcontracting as requested in the Union's letters of May 8 and 29, 2003, it must provide the foregoing relevant information.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Company, Garcia Trucking Service, Inc., Carolina, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Union de Tronquistas de Puerto Rico as the exclusive representative of all employees in the unit by failing to provide the Union with the relevant information it requested regarding the names and addresses of newly hired unit employees and subcontracting.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the relevant information of the names and addresses of newly hired unit employees as initially requested by the Union on April 30, 2003.

(b) Provide the Union with the relevant information relating to subcontracting that the Union requested in its letters of May 8 and 29, 2003.

(c) Within 14 days after service by the Region, post at its facility in Carolina, Puerto Rico, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

by the Regional Director for Region 24, after being signed by the Company's authorized representative, shall be posted both in English and Spanish by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice both in English and Spanish to all current employees and former employees employed by the Company at any time since April 30, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 24 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C. May 5, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Union de Tronquistas de Puerto Rico by failing to provide the Union with the names and addresses of newly hired employees in the appropriate unit, and WE WILL provide that information.

WE WILL NOT refuse to bargain with the Union by failing to provide the Union with the information relating to subcontracting that the Union requested on May 8 and 29, 2003, and WE WILL provide that information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

GARCIA TRUCKING SERVICE, INC.